92-1715

Supreme Court, U.S.
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No.____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NARCISO S. MARILAO, JR.,

PETITIONER,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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84 pp

QUESTIONS PRESENTED

1. Whether the lower Court's denial of Defendant-Petitioner's right of inspection of the jury selection records under 28 USC Sec. 1867 (f) denied him due process of law under the 5th and 14th Amendment to the United States Constitution.

2. Whether the Lower Court in denying Petitioner's Right under Rule 32 (c) (3) of the Federal Rules of Criminal Procedure to comment on the Presentence Report of the Probation Officer Denied him Due Process of Law as Guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

3. Whether the Government violations of the attorney client relationship and Rules 4.2 and 5.3 of the ABA Code of Professional Conduct as adopted in Pennsylvania which prohibits a lawyer or his agents from communicating with a party who is

represented by another lawyer without the other lawyer's consent, together with other Governmental Misconducts, denied Petitioner Due Process and fair trial, and amounted to outrageous Governmental Misconduct warranting Dismissal or New Trial.

4)Whether the Admission Under Rule 404(b) of the Federal Rules of Evidence of the Martins' Testimonies (Government Key Witnesses) about Petitioner's alleged uncharged Dissimilar Criminal activities caused unfair Prejudice and Denied Him a Fair Trial.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit entered on January 21, 1993.

OPINIONS BELOW

The judgment order of the Court of Appeals below (Appendix "A" p.1A) was not reported. Judgment of the District Court below (Appendix D p.8A) was not reported.

JURISDICTION

The judgment of the United States Court of Appeals below (Appendix A p. 1A) was entered on January 21, 1993. The order denying the Petition for Rehearing (Appendix B p. 4A) was entered on February 23, 1993. Jurisdiction is conferred upon this Court by 28 USC, Section 1257(1) to review by writ of certiorari a final judgment rendered by the United States Court of Appeals.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. Fifth Amendment, United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment, United States Constitution, Sec. 1, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 28 USC Sec. 1867 (f) which provides:

f) The contents of records or papers used by the jury commision or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1836(b)(4) of this title, and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year, or both. (See full Text of 28 USC Sec. 1867, in appendix G).

4. Rule 32 (c) (3), Federal Rules of Criminal Procedure.(See Appendix H for full text)

STATEMENT OF THE CASE

A. Proceedings Below:

The Petitioner was charged by a Grand Jury in the District Court with conspiracy to defraud the Immigration and Naturalization Service (hereinafter called "INS") under 18 USC Sec. 371, and false statements in the legalization applications under 18 USC Sections 1001, 1002. Petitioner pleaded not guilty to all counts.

Prior to trial, on November 9, 1990, Petitioner filed a Combined Motions: Motion to inspect Grand Jury minutes, and Motion for Inspection, Reproduction, Copying of the records with the Court Clerk pursuant to 28 USC Sec. 1366, and Sec. 1367 (b)(d) and (f). (Appendix E, p.14 A) Both motions were denied, with the Court declining action on Petitioner's motion for inspection, reproduction and copying of the records with the Court Clerk under 28 USC Sec. 1867 (b)(d) and (f).

On March 22, 1991, petitioner through counsel filed the Defendant's Motions to Dismiss for

Governmental Misconduct, Grand Jury Abuse, and Unconstitutional Composition of the Grand Jury (AppendixF , p.29A), all of which were denied.

On April 15, 1991, the Government filed a motion in Linine to admit the testimonies of Ramon and Marie Martin . This was granted by the Court under Rule 404 (b) Federal Rules of Evidence, notwithstanding oral objections by the Defense.

After a trial by an all white jury, the jury returned a guilty verdict on the four counts.

During the sentencing on April 24, 1992, the Court refused Petitioner's request to comment on the Revised Presentence Report of the Probation Officer. (Video Tape 4/24/92)

Petitioner was sentenced, judgment rendered (Appendix D, p8A) and corrected judgment entered on May 15, 1992. Petitioner appealed to the United States Court of Appeals for the Third Circuit, but said Court affirmed the judgment of conviction by a Judgment order, without discussing the issues. (Appendix A , p1A)

B. Statement of Facts.

Petitioner is an American citizen of Philippine origin, 62 years old, of previously unblemished reputation, and a lawyer with a clean record for more than 30 years.

On May 21, 1990, Petitioner accompanied three (3) applicants for legalization (Corado, Pamposa and Panahon) in their interview in the INS office in Philadelphia, PA. On that same day, after their interview, Petitioner represented the applicants, as their counsel, when they were interrogated by the INS criminal investigators in their office. Upon advise of Petitioner as their counsel, the applicants invoked their constitutional rights to remain silent during the interrogation.

Irritated and angered by the refusal of the applicants, upon counsel's advise, to answer their questions, the INS investigators launched that very day their Operation "Barrister" (to go after their lawyer), although the investigators had no evidence against him.

In or about July 1990, the INS investigators made contacts with the applicants, Pamposa and Corado, in their residences, in the absence and without the knowledge of their counsel, the Petitioner. This appears to have been made with the consent, authorization and/or supervision of the government lawyers in violation of the ABA Code of Professional Conduct, Rules 4.2 and 5.3 as adopted in Pennsylvania, as well as the attorney-client relationship.

Other government misconducts were committed during the grand jury proceedings and jury trial which are discussed under the heading: Reasons for Allowance of the Writ.

EXISTENCE OF JURISDICTION BELOW

The United States District Court for the Eastern District of Pennsylvania had jurisdiction under 18 USC Section 3231, which provides that the District Courts have original jurisdiction of all offenses against the laws of the United States.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE JUDGEMENT OF THE COURT OF APPEALS WHICH AFFIRMED THE ACTION OF THE TRIAL COURT IN DENYING THE DEFENDANT ACCESS TO THE JURY SELECTION RECORDS PURSUANT TO 28 USC SEC. 1867 (f) IS CONTRARY TO THE DECISION OF THIS COURT IN TEST VS. UNITED STATES 420 U.S. 28 (1975) AND THE DECISIONS OF SEVERAL OTHER CIRCUIT COURT OF APPEALS.

The pertinent provisions of 28 USC Sec. 1867 (f) provides:

> "(f) The contents of records or papers used by the jury commision or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the District Court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section... The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such motion.

In interpreting this provision the United States Supreme Court in Test v. United States, 420 U.S. 28 (1975) ruled:

> "This provision makes clear that a litigant has essentially an unqualified right to inspect jury lists. It grants access in order to aid parties in the "preparation" of motions challenging jury-selection procedures. Indeed, without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge. Thus, an unqualified right to inspection is required not only by the plain text of the statute, but also by the statute's overall purpose of insuring "grand and petit juries

selected at random from a fair cross section of the community." 28 U.S.C. Sec. 1861.

Since petitioner was denied an opportunity to inspect the jury lists, we vacate the judgment of the Court of Appeals and remand the case to that court with instructions to remand to the District Court so that petitioner may attempt to support his challenge to the jury selection procedures.

The situation in the present case is similar to that in Test v United States. Here, as in Test the appelant challenge the jury selection process claiming among others the systematic exclusion of minorities such as persons of Spanish and Asian origin and young people in violation of the Constitution, and appelant filed a motion under 28 USC Sec. 1867(f) for inspection of the jury selection records in the custody of the clerk of court to make discovery of evidence necessary to support his challenge of discrimination in the selection of the Grand Jury and thereafter the petit jury. In this instant case as in "Test v United States, the District Court rejected the jury challenge and denied the motion to inspect the records, and Petitioner renewed his claims before the Court of Appeals, but the Court of Appeals,

like in Test v United States, affirmed the conviction without discussing the issues. Under similar situation the Supreme Court in Test v United States granted "certiorari to decide whether the Jury Selection and Service Act required that petitioner be permitted to inspect the jury lists." (See Test v United States, 420 US 29, at 29).

The decision of the United States Supreme Court in Test v UnitedStates is therefore fully applicable to the present case.

In United States v Alden, 776 F2d 771(1985), the United States Court of Appeals for the 8th Circuit stated:

> Even if Defendant's anticipated challenge to the jury selection process, as anticipated at the time of his motion for inspection, are without merit, the Defendant may still inspect the jury records. Grounds for challenge to the jury selection process may only become apparent after an examination of the records. Test v United States, 420 US at 30, S. Ct. at 750; Davis, 582 F. 2d at 839. (United States v Alden, 776 F. 2d 771 (1985), at 775.

To avail himself of right of access to otherwise unpublish jury selection records, Defendant need not allege that he is preparing motion challenging jury selection process. (United States v Alden

1985, CA 8 Mo) 776 Ed 771. 28 USC Sec. 1867(f) gives litigant unqualified right to inspect jury list in order to aid parties in preparation of motion challenging jury selection procedures. (United States v Penia (1981, WD Dela) 516 F. Supp. 248); (United States v Studby (1986, CA 9 Cal.) 783 F 2D 934).

District Court's denial of Defendant's Pretrial Motion for Inspection and Copying of Jury Records Pursuant to 28 USC Sec. 1867 (f) for purpose of preparation in presentation of motion challenging compliance with statutory jury selection process constituted reversible error. (Gov't of Canal Zone vs. Davis (1979, CA Canal Zone) 592 F. 2d 887); (See also US v Beaty 1972, CA 9 Ariz.) 465 F 2d 1376.

In reversing the lower court's judgment , the Appeals Court in Gov't of Canal Zone v Davis (592 F.2d 887) held:

> "Since the appelant's right to inspect was unqualified, whether or not the accompanying affidavit established a prima facie case of defective jury selection process is of no importance,."Citing Test v United States" 420 US at 29 n.2.

It further held:

> "Where, as here, a defendant is denied access to the very materials containing the information necessary to filing of a motion to dismiss for defective jury selection, his failure to file a formal motion blindly and speculatively drafted will not be viewed as an abandonment of his rights to inspection". (Ibid, at 889).

In the present case, the Trial Court clearly commited reversible error in denying the defendant the right to inspect jury records in connection with his motion challenging the selection of the Grand Jury and thereafter the petit jury, thus denying him his constitiutional and statutory rights.

II. THE LOWER COURT IN DENYING PETITIONER'S RIGHT UNDER RULE 32(c)(3) OF THE FEDERAL RULES OF CRIMINAL PROCEDURES TO COMMENT ON THE PRESENTENCE REPORT OF THE PROBATION OFFICER VIOLATED DUE PROCESS OF LAW AS GUARANTEED BY THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION AND SUCH DENIAL IS IN CONFLICT WITH OTHER CIRCUIT COURT OF APPEALS DECISIONS.

This involves important issues of constitutional law that ought to be resolved because although some lower courts have decided on this question, this Honorable Court has not spoken or decided on this issue.

The Court of Appeals was in error in confirming the judgement of the lower court which denied the Defendant the right to comment or prohibited the defendant from making comments on the Revised Presentence Report of the Probation Officer during the sentencing on April 24, 1992 (Video Tape 4/24/92), in violation of Rule 32 (c) (3) of the Federal Rules of Criminal Procedure. During the sentencing Defendant-Petitioner requested the court that he be allowed to comment on the Revised Presentence Report of the Probation Officer but the District Court denied his request. (Video Tape 4/24/92).

The pertinent provisions of Rule 32 (c) (3) of the Federal Rules of Criminal Procedure provides:

3) Disclosure

A) At least 10 days before imposing sentence, unless this minimum period is waived by the defendant, the court shall provide the defendant and the defendant's counsel with a copy of the report of the presentence investigation, including the information required by subdivision (c) (2).....
The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

B) If the court is of the view that there is information in the presentence report which should not be disclose under sub-division (c) (3) (A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and thedefendant's counsel an opportunity to comment thereon.

D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a

determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

Under amended FRCr P32 (3) the court must permit the defendant and his counsel to read the presentence investigation report at a reasonable time before imposing sentence or summarize and give both the defendant and his counsel an opportunity to comment thereon. FRCr.P32 (c) (3) (D), (E), (F). (9 Federal Procedure, L. Ed Supp. June 1990, Sec. 22:18, p. 373). (Underscoring supplied).

Since defendant in criminal case is entitled to due process in all phases of prosecution, including sentencing, and due process requires that defendant not be sentenced on basis of materially false information, defendant is thus entitled to effective opportunity to respond to sentencing position advanced by the government, including opportunity to review and comment upon presentence report prepared by probation office of the court. United States v Alexander (1988, CA 2 NY) 860 F. 2d 508. Orfield's Criminal Procedure under the Federal Rules, 2nd Ed. Supp. August 1990, Vol.

5, Sec. 32:33, P.19.

FRCrP32 was violated by failure of court to show report of presentence investigation to defendant personally before sentencing, so that defendant could point out any inaccuracies to sentencing judge. Johnson v. United States (1986, CA7 111) 805 F. 2d 1284; Orfield's, Ibid, Sec. 32:33, p.15. (Underscoring supplied). Failure of sentencing judge to afford defendant his absolute right of allocation is error, requiring reversal for resentencing. United v. Sparrow (1982, CA 5 Miss) 673 F.2d 862.

In the instant case, the lower Court by denying Defendant's constitutional and statutory rights to comment on the revised Presentence Report prejudicially denied him due process as provided for in the 5th and 14th Amendment to the U.S. Constitution, which is reversible error.

III. THE GOVERNMENT'S VIOLATIONS OF THE ATTORNEY-CLIENT RELATIONSHIP AND RULES 4.2 AND 5.3 OF THE CODE OF PROFESSIONAL CONDUCT AS ADOPTED IN PENNYSLVANIA, WHICH PROHIBITS A LAWYER OR HIS AGENTS FROM COMMUNICATING WITH A PARTY WHO IS KNOWN TO BE REPRESENTED BY ANOTHER LAWYER WITHOUT THE OTHER LAWYER'S CONSENT, TOGETHER WITH OTHER GOVERNMENTAL MISCONDUCT, DENIED PETITIONER DUE PROCESS AND FAIR TRIAL, AND AMOUNTED TO OUTRAGEOUS GOVERNMENT MISCONDUCT WARRANTING DISMISSAL OR NEW TRIAL, SO THAT THE LOWER COURT JUDGMENT WAS IN ERROR.

The conduct of the Government, both by its agents and attorneys, was violative of the the Code of the Professional Conduct ("Code"), as adopted in Pennsylvania.

Rule 4.2 of the Code provides:

> "(I)n representing a client, a lawyer shall not communicate about the subject of the representation with a party lawyer knows to be represented by another lawyer matter, unless the lawyer has consent of the other lawyer or is authorized by law to do so."

Rule 5.3 of the Code provides:

> "(W)ith respect to a non-lawyer employed or retained by or associated with a lawyer:.... (b) a lawyer having direct authority over the nonlawyer should make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (c) a lawyer shall be responsible for conduct of such a person that would be in violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved;.....

Under the terms of Rule 5.3 of the code, the INS agents who conducted the uncounseled interviews and coercion of Corado and Pamposa were associated with and the alter egos of the government attorneys assigned to the investigation and prosecution of the Defendant. But for the government's destruction of the attorney-client relationship, and a deliberate disregard for the ethical duties required of lawyers, the Government would be without any evidence indicative of criminal conduct by the Defendant.

The Court, through an exercise of its supervisory powers, may dismiss an indictment if required to protect the Defendant's rights. United States v Al Mudarris, 695 F. 2 1182 (9 Cir.), cert. denied 461 US 932, (1983). Where the government conduct leading to the indictment is outrageous, United States v Russell, 411 US 423 (1973), the Court must dismiss an indictment in order to deter further, similar, misconduct by the Government. United States v. Houghton, 554 F2d 1219 (1st Cir.), cert. denied, 434 US 851, (1977).

On May 21, 1990, the Government knew that Corado and Pamposa were represented by the Defendant, as their lawyer, when they were detained and interrogated by the INS agents in their office. On that date the Government knew that Defendant advised each of his clients to remain silent in the face of the INS agents efforts to elicit incriminating information and evidence from them. At no time after said interrogation on May 21, 1990 did the defendant terminated or his clients terminated his representations of said clients, nor did he consent to his clients uncounseled interview or interrogations by the INS agents subsequent to said date.

In the matter at hand, any member of the Bar ought to know the surreptitious interviewing or interrogating a client known to be represented by a lawyer is a gross violation of the standards of ethical behavior expected of those admitted to practice law. Clearly, even if the Government did not initiate the improper contact with Defendant's clients, nevertheless he should have known that such contact by the government agents was improper and he should not have ratified said improprieties

by the use of the information or evidence garnered by the agents in order to obtain an indictment of or against the Defendant in this case.

Without Defendant's consent to that interview, any contact by Government counsel with Defendant's clients would be prohibited under the Code, so long as Defendant continued to represent those clients. Indeed, under the Rule 2 of the Local Rules of Criminal Procedure ofPennsylvania, and applying those Rules to attorneys involved in criminal litigation before the Court, government counsel's violation of the Rules is clear. See also, United States v. Hammad, 858 F. 2d 834, 837-838 (2nd Cir. 1988).

Additionally, even if government counsel did no more than ratify the investigative conduct of the INS agents, that conduct was not legitimate investigative technique otherwise allowed by law, Hammad, Supra. at 839, and government counsel's ratification of that conduct is analogous to the conduct prohibited by the Court in United States v Caputo, 641 F Supp. 378 (E.D. Pa 1986) as well as in Hammad.

Other serious Government Misconducts consist of the following:

The Prosecutor who presented the charges to Grand Jury committed Misconduct by:

a) Witholding or failing to inform the jury of the lenient charges and sentences and Employment Authorization Cards given to government star witnesses Corado and Pamposa, so they will go against or falsely testify against their lawyer (Appellant). ABA Standards, the Prosecution Function S 3.6(G) - The Prosecutor should disclose to the Grand Jury any evidence which he knows will tend to negate guilt. (See United States v Phillips Petroleum Co.) 435 F. Supp. 610, 617-22 (N.D. Okla. 1977); (United States v Braniff Airways Inc.), 428 F. Supp. 579 (W.D. Texas).

b) Inviting and allowing the presence of unauthorized person during the presentation of evidence to and deliberation of the Grand Jury in which he seek the indictment herein. Specifically, inviting and permitting another Assistant U.S. Attorney to attend as observer during the presentation and deliberation of the Grand Jury. In United States v Braniff Airways, Inc. (1977, W. D. Texas) 428 F. Supp. 579, the Court dismissed an indictment where it appeared a Justice Department Attorney was present in the Jury room when the case was being presented to the jury. It rejected the government's contention that the attorney was present to observe so that he could present other cases in the future. 68 ALR Fed. Sec. 5(a) p. 814.

Defendant asserts that prosecutors have a clear duty to present exculpatory evidence to a Grand Jury, Johnson v Superior Court 539 P 2 792 (1975); United States v Phillip Petroleum Co., 435 F. Supp. 610, and a conviction cannot be permitted to stand where a prosecutor has, either wilfully or negligently, withheld material evidence favorable to the Defendant. Tomas v United States, 343 F. 2d 49 (1965).

In the present case, since the applicants, Pamposa and Corado, were illegal aliens who had been hiding from the INS for several years, it is clear that they were easily intimidated by the approach of the INS agents and the fear that these agents could detain and deport them. Upon being approached by the INS agents in the absence of their counsel, Pamposa and Corado were easily intimidated into making false statements against the Defendant.

These materials, exculpatory, evidence should have been but were not disclosed to the Grand Jury and appeared deliberately withheld from them. Defendant's indictment hinged primarily upon the testimonies of Corado and Pamposa, without which

testimony there would not have sufficient evidence to sustain an indictment.

Various courts have recognized that certain agreements between the prosecution and its witnesses are "invitations to perjury" and are violative of constitutional guarantees of the due process and trial. See, Defending Business and White Collar Crimes, by L. Bailey, et. al, Vol. 1, Crim. Supp., p.2 (Dec. 1990). In Giglio v US 92 S. Ct. 763 (1972), U.S. Supreme Court Chief Justice Burger held that if an Assistant United States Attorney, who first dealt with key government witnesses, promised a witness that he would not be prosecuted if he cooperated with the Government, such a promise was attributed to Government, regardless of whether attorney had authority to make it, and nondisclosure of that promise, which was not communicated to Assistant United States attorney who tried the case, would constitute a violation of due process requiring a new trial.

Government Misconducts During the Trial

In his opening statement, the Prosecutor emphasized excessive fees that he claimed were charged by the Defendant which the government intended to prove but never did. This was highly inflammatory and prejudicial to the Defendant because it directly attacked his character, portraying him as a greedy lawyer who charged exorbitant fees preying on poor innocent victims. (Video Tape 4/17/91).

In the cross examination, Ms. Jane Goldblum admitted that during the recess, she conferred with the Prosecutor as to her testimony, so that after the recess she was able to cure some deficiency and improve her testimony claiming that she had spent several hours in research and negotiation with the Prosecutor on no deportation and advance parole for the Prosecution witness Martin, which the government will not oppose, but for which she charged $3,000.00 as her attorney's fee (Video Tape 4/24/91), insinuating that Defendant's fees were exorbitant but not hers.

"During direct examination, the fourth witness was "not sure" as to the date of a certain conference at which representatives of the corporate defendant were present. At a recess period his memory was refreshed during a conversation with an Assistant U.S. Attorney. Upon resuming the stand, he corrected his previous testimony as to the date. On cross-examination, he admitted that the error has been called to his attention by the Assistant. The Court then excused the jury and after excoriating the Assistant called the Jury back into session and directed the verdit of acquittal. (Fong Foo v United States, 369 U.S. 141, 1962); See United States v. Oliver, 570 F. 2d 397 (1st Cir. 1978); United States v Capocci, 433 F. 2d 155 (1st Cir. 1970).

During the trial, the Prosecutor insinuated guilt by alleged failure of Appellant to present employees of his office as witness,notwithstanding the fact that Augusto Sarmiento, a defense witness, was an employee of appellant's office during the period in question, (Video Tape 4/24/91). The Prosecution's insinuations were not only untrue and unfair but also improper outrageous conduct. (See Griffin v Calif. 330 U.S. 609, 5613-5; U.S. v Modica, 663 F. 2d 1173, 1178 (2d Cir. 1981), cert. denied456 U.S. 989). The Prosecutor further improperly vouched as to the credibility of his witnesses, especially with respect to the Martins'

by reading a portion of the Prosecutor's agreement with the Martin's vouching on the truthfulness of their testimonies. This was erroneously admitted by the trial court over the objection of the defense. (Video Tape 4/23/91).

In his closing, the Prosecutor made inflammatory and prejudicial remarks to the jury, repeatedly pitting Defendant against the prosecution witnesses and personally insinuating that the Defendant was lying and the Prosecutor's witnesses telling the truth. (Video Tape 4/25/91). Arguments which convey the personal opinion of the prosecutor as to the justness of his cause, and the credibility of his witnesses are outrageously improper in violation of ABA Prosecution Standard 3-58 (b). See Wilson v United States, So. 2d 126, 128 (Fla., 1978); Model Code of Professional Responsibility DR7-106(c) (4) (1980). Arguments designed to inflame the passions or prejudices of the jury are highly improper (see Donnelly v De Christofono, 416 U.S. 636, 646-47, and ABA Prosecution Standards, Std.3-5.8. (e).

Based on the combined grounds of improper conducts of the Prosecutors and goverment agents in the investigation and prosecution of this case, a judgment of dismissal or new trial would be proper and justified. (See Fong Foo v United States.., Ibid; United States v Oliver, Ibid, 570 F. 2d 397; and United States v Capocci, Ibid.).

IV. THE ADMISSION BY THE LOWER COURT UNDER RULE 404 (b) OF THE FEDERAL RULES OF EVIDENCE OF THE MARTIN'S TESTIMONIES ABOUT DISSIMILAR CRIMINAL ACTIVITIES FOR WHICH PETITIONER WAS NOT CHARGED CAUSED UNFAIR PREJUDICE VIOLATING HIS RIGHT TO A FAIR TRIAL.

There is a substantial question as to whether the prior acts of defendant as claimed by the Martin's were dissimilar to the offenses which were charged in this case. Assuming arguendo that the prior acts of defendant were similar to the crimes charged, there is substantial question whether their potential for unfair prejudice far outweight their provative value. The Martin's claim that defendant assisted them in the preparation of alleged fraudulent applications under the RAW program (Replenishment Agricultural Workers program) was so dissimilar to the amnesty program charged in the indictment as to make their testimonies not probative. As such their testimonies were not intended to show common plan, scheme or design or to show absence of mistake or accident but to establish defendant's propensity to

commit the crimes charged in the indictment. Even granting said program to be similar to the amnesty program involved in the present charged, given the overwhelming prejudicial effect of their testimonies which far outweighed their probative value, the same should not have been admitted into evidence.

> Protection against unduly prejudicial similar-acts evidence admitted under Rule 404 (c) emanates in part from assessment which the District Court must make to determine whether probative value of similar-acts evidence is substantially outweighed by potential for unfair prejudice under Rule 403. Huddleston v United States (1988) 485 US 681.

> Prior acts should not have been admitted since prior activities were too dissimilar from the offenses charged to permit prior acts to serve as valid proof of intent to commit the offenses charged. See United States v Miller (1989, CA 9 Cal.) 874 F. 2d 1255.

In prosecuting for conspiracy and false statements to government agency, the Court should not have admitted evidence of defendant's alledged prior bad acts under Rule 404 (b) where evidence of prior acts had no relevance to charges filed except to established propensity to falsification, which

is the kind of conclusion prohibited by Rule 404(b). See United States v Cortijo-Diaz (1989, CA 1) 875 F 2d 93.

CONCLUSION

This Petition involves questions of exceptional importance since it affects fundamental and constitional rights of the parties in criminal and civil cases to due process of law and a fair jury trial, and constitional and statutory rights of defendants in criminal cases to comment on the probation report which will affect their lives, liberty and property.

For the reasons set forth above, the Petitioner respectfully prays this Honorable Court to grant the herein writ.

Respectfully submitted,

Dated: April 16, 1993

Narciso S Marilao, Jr.
Petitioner Pro Se
11 John St., Suite 503,
New York, NY 10038
(212) 693-1340

APPENDICES

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1872

UNITED STATES OF AMERICA

v.

NARCISO SANTIAGO MARILAO, JR.,
Appelant

Appeal from the United States District Court for the Eastern District of Pennsylvania
D.C. Criminal No. 9-00473-01
(Honorable Lowell A. Reed, Jr.)

Submitted January 8, 1993

Before: Hutchinson and Scirica, Circuit Judges and Standish, District Judge*

JUDGMENT ORDER

After considering the contentions raised by appelant, to wit, that:

---

*The Honorable William L. Standish, United States District Judge for the Western District of Pennsylvania, sitting by designation.

1. The court erred in denying appelant's motions to (1) inspect grand jury minutes, and, (2) for inspection, reproduction and copying of the records and papers in the custody of the court clerk pursuant to 28 U.S.C. Sections 1866 and 1867 (a), (d) and (f) (including the master jury wheel, lists and records);

2. The evidence was insufficient to convict and/or the verdict and judgment is against the weight of evidence;

3. Misconduct by the prosecutor and government agents warrants dismissal of the indictment, or new trial;

4. The indictment and jury instructions were erroneous in charging one conspiracy, where the evidence showed two separate and individual transactions, not a single transaction or alleged conspiracy;

5. The court erred in admitting the

testimony of Ramon and Marie Martin under Fed.R.Evid. 404(b);

6. The court erred in imposing the sentence herein; and,

7. The court erred in denying appelant's motion for judgment of acquittal and/or new trial, it is

ADJUGED AND ORDERED that judgment of the district court be and is hereby AFFIRMED.

BY THE COURT,

(Sgd.) Scirica

Circuit Judge

Attest:

Sally Mrvos, (Sgd.)

Clerk

Dated:January 21, 1993

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1872

UNITED STATES OF AMERICA

v.

NARCISO SANTIAGO MARILAO, JR.,
Appelant

(D. C. Crim. No. 90-00473-01)

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEM, NYGAARD, ALITO, ROTH AND LEWIS Circuit Juges, and Standish* District Judge

The petition for rehearing filed by appelant in the above-entitled case having been submitted to the judges who participated in the decision of this Court

---

*As to panel rehearing only.

and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

By the Court,

(Sgd.) Scirica

Circuit Judge

Dated: February 23, 1993

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v.

NARCISO S. MARILAO, JR.

CRIMINAL NO. 9000473

ORDER

AND NOW, this 15th day of April, 1991, upon consideration of defendant's motion to Inspect Grand Jury Minutes with Request for Extension of Time to Move to Dismiss, the Motion of Defendant Narciso Santiago Marilao, Jr., For Dismissal of Indictment Based Upon UnConstitutional Composition of Grand Jury, the government's consolidate responses thereto, and the entire record in this case, it is hereby

O R D E R E D

that defendant's Motion to Inspect Grand Jury Minutes with Request for Extension of Tim to Move to Dismiss is Denied, as moot since the minutes have been supplied.

BY THE COURT:

(Sgd.) LOWELL A. REED, JR.
United States District Judge

Entered: April 18, 1991

AO 245 B (Rev. 4/90) Sheet 1 - Judgment in a Criminal Case APPENDIX "D"

United States District Court

Certified as a true copy on This Date: ... By ... Clerk / Deputy

EASTERN District of PENNSYLVANIA

UNITED STATES OF AMERICA
V.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

NARCISO SANTIAGO MARILAO, JR. Case Number: CR. 90-00473-01

(Name of Defendant)

Jack Gruenstein, Esquire
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) ...

☒ was found guilty on count(s) 1, 2, 3 and 4 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
371	Conspiracy to defraud INS.	May 21, 1990	1.
1546(a)	Use of fraudulent immigration documents.	May 21, 1990	2,3,4.

A TRUE COPY CERTIFIED TO FROM THE RECORD
DATED: May 13, 1992
ATTEST: Mary E. Duane
DEPUTY CLERK, UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ... and is discharged as to such count(s).

☐ Count(s) ... (is)(are) dismissed on the motion of the United States.

It is ordered that the defendant shall pay a special assessment of $200.00, for count(s) 1, 2, 3 and 4, which shall be due ☐ immediately ☒ as follows: within thirty (30) days of today's date.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 564-63-9526

Defendant's Date of Birth: December 29, 1930

Defendant's Mailing Address:

Defendant's Residence Address:
42 Center Street
Jersey City, NJ 07312

APRIL 24, 1992
Date of Imposition of Sentence

Signature of Judicial Officer

LOWELL A. REED, JR., U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

May 12, 1992.
Date

U.S.G.P.O.: 1990-732-448/18288

IMPRISONMENT

...defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned f...
...sixteen (16) months

...court makes the following recommendations to the Bureau of Prisons:

...endant is out on bail pending the filing of an appeal.

...endant is remanded to the custody of the United States marshal.
...endant shall surrender to the United States marshal for this district,
...at _____ a.m. / p.m. on _____.
...as notified by the United States marshal.
...endant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
...before 2 p.m. on _____.
...as notified by the United States marshal.
...as notified by the probation office.

RETURN

...e executed this judgment as follows:

...ndant delivered on _____ to _____, with a certified copy of this judgmen...

_____
United States Marshal

By _____
Deputy Marshal

...U.S. GPO: 1990 722-448/10266

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three years to commence upon the completion of incarceration

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall y possess a controlled substance. The defendant shall comply with the standard conditions that have b d by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a conditio ised release that the defendant pay any such restitution that remains unpaid at the commencement of of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall report in person to the probation office in the district to which the defendant is relea hin 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised rele

The defendant shall not possess a firearm or destructive device.

SPECIAL CONDITIONS OF SUPERVISED RELEASE ARE: (SEE ATTACHED ADDENDUM)

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In ac

The defendant shall not leave the judicial district without the permission of the court or probation officer;

The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written repor first five days of each month;

The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

The defendant shall support his or her dependents and meet other family responsibilities;

The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable re

The defendant shall notify the probation officer within 72 hours of any change in residence or employment;

The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other con substance, or any paraphernalia related to such substances, except as prescribed by a physician;

The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband obs in plain view by the probation officer;

The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the

As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or pe history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notifi requirement.

o U S GPO 1990-722 448/1020

fendant: NARCISO S. MARILAO, JR. Judgment-Page 4 of 6
se Number: CR. 90-00473-01

ADDENDUM OF SPECIAL CONDITIONS OF SUPERVISED RELEASE

ecial conditions of supervised release are:

Defendant shall observe the standard conditions of supervised lease of the District Court for the District in which the fendant resides.

Defendant shall not possess any firearms or other dangerous apons.

Defendant shall submit financial information to the Probation fice at anytime upon request, including providing copies of his rsonal federal, state, and local income tax returns to the obation Office upon request, and within thirty (30) days of ling said returns.

Defendant shall pay a fine in the sum of $10,000.00 on an stallment basis, on a periodic basis on a schedule set by the obation Office. The failure to pay any installment of this e may be grounds for revocation of the status of supervised lease. The defendant is ordered to liquidate any assets cessary to pay the fine or its installments.

NARCISO SANTIAGO MARILAO, JR. Judgment—Page 5 of 6
CR. 90-00473-01

FINE

endant shall pay a fine of $ 10,000.00. The fine includes any costs of incarceration and/
on

ount is the total of the fines imposed on individual counts, as follows: Counts 1, 2, 3 &

urt has determined that the defendant does not have the ability to pay interest. It is ordered that:

interest requirement is waived.
interest requirement is modified as follows:

plus any interest required shall be paid:
ll immediately.
ll not later than _____.
qual monthly installments over a period of _____ months. The first payment is due on the
e of this judgment. Subsequent payments are due monthly thereafter.
nstallments according to the following schedule of payments: on an installment basis,
a periodic basis on a schedule set by the Probation Office.

not paid, the court may sentence the defendant to any sentence which might have been
posed. See 18 U.S.C. § 3614.

U.S.GPO 1990-722-448/10288

NARCISO SANTIAGO MARILAO, JR. Judgment—Page 6 of 6
CR. 90-00473-01

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

OR

The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): SEE ATTACHED ADDENDUM - (4 pages)

Guideline Range Determined by the Court:

Total Offense Level: 12

Criminal History Category: I

Imprisonment Range: 10 to 16 months

Supervised Release Range: 2 to 1 years

Fine Range: $ 3,000.00 to $ 10,000.00

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ N/A

☐ Full restitution is not ordered for the following reason(s):

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

upon motion of the government, as a result of defendant's substantial assistance.

for the following reason(s):

(2) U.S. Marshal
Probation
Pretrial
AUSA
Defense Counsel

* U.S. GPO: 1990-722-448/10288

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA :

vs.

NARCISO S. MARILAO, JR :

CRIMINAL NO. 90-0047301

COMBINED MOTIONS

MOTION TO INSPECT GRAND JURY MINUTES WITH
REQUEST FOR EXTENSION OF TIME
TO MOVE TO DISMISS

Defendant in the above-entitled action respectfully moves the court as follows:

1. For an order, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, permitting defendant to inspect the minutes of the Grand Jury of the United States for the Eastern District of Pennsylvania for all sessions during which it considered matters leading to the filing of the indictment herein, and directing the United States Attorney for

the Eastern District of Pennsylvania (Seth Weber Esq.) to make available to defendant a copy of the minutes.

2. For an order, pursuant to Rule 45(b) of the Federal Rules of Criminal Procedure extending the time within which Defendant may move to dismiss the indictment herein until 15 days after entry of the order determining this motion.

This motion is made on the grounds that matters occuring before said grand jury may constitute grounds for a motion to dismiss the indictment, and that the extension of time is necessary to permit the inspection of such minutes prior to the preparation and filing of such a motion.

Dated November 7, 1990.

Narciso S. Marilao, Jr.
Defendant
11 John Street, Suite 503
New York, NY 10038
(212) 693-1340

MOTION FOR INSPECTION, REPRODUCTION, AND COPYING OF THE RECORDS AND PAPERS IN THE CUSTODY OF THE COURT CLERK PURSUANT TO 28 USC SEC. 1866 AND SEC. 1867 (a),(d) & (f)

The defendant moves this Court for an Order permitting him to make discovery of certain records and facts necessary to the support of this challenge to the indictment because of discrimination in the selection of the grand jury, etc., in support of the said motion for discovery, he alleges as follows:

The defendant hereby moves, pursuant to 28 U.S.C. Sec. 1867 (a), (d), (f), for an Order directing the Clerk of the Court to permit the defendant, his attorney or representative to inspect, reproduce and copy the contents of records and papers used by the Clerk of the Court in the selection process for the Grand Jury which

returned the above entitled indictment and the selection process for the prospective petit jury to be summoned for the trial of the instant case.

The information sought by this motion is based on the defendant's information and understanding of the jury selection process as provided for in the plan for this federal district, as well as the information provided by others.

Defendant specifically seeks discovery of records necessary for him to conduct a statistical study of the jury selection process at each level of functioning for this Court.

Defendant moves for the discovery of the following information and materials:

a. That the Clerk of the Court be directed to provide defendant with all information at his disposal concerning procedures followed in implementing the

jury plan for this Court. Such information is to include, but is not to be limited to, the following:

i.The numbers selected at random which determine the application of the quotient for selection of names from the voter registration list according to the provisions of the jury plan for this Court, this number to be provided for all divisions.

ii. The total number of names of persons so selected, drawn from a master jury wheel in each of the divisions, to whom qualification questionnaires were sent.

iii.The total number of such qualification questionnaires which were returned to the Clerk of the Court as incapable of being delivered.

iv. The total number of qualification questionaires delivered by the postal service, but not returned by the recipient.

v. The addresses of all those persons who failed to respond or whose qualification questionnaires were returned as non-deliverable.

vi. Any procedure taken with regard to those persons who did not respond.

vii.The total number of juror qualification questionnaires not placed in the qualified jury wheel, and

viii. Other information concerning

the processing of the questionnaires, excusals, disqualifications, and/or exemptions.

b. That the Clerk of the Court be directed to permit inspection, reproduction, and/or copying by the defendant and his representatives, of the total number of juror qualification questionnaires (or, depending upon the number, some percentage thereof, to be determined in the future and selected randomly), which correspond to the names which have been drawn from the voter registration lists.

c. That the Clerk of the Court be directed to permit defendant and his representatives inspection, reproduction and/or copying of the total number, or a random sample thereof, of the juror qualification questionnaires for the division, which questionnaires were received by the Clerk of the Court and were not placed into the qualified jury wheel, wether because the prospective juror was disqualified, exempt or excused.

d. That the Clerk of the Court be directed to permit defendant and his representative inspection, reproduction and/or copying of the total number of jury qualification questionnaires for the division, which questionnaires correspond to persons who were initially qualified for service but did not respond to the summons for service or were disqualified, exempted or excused, temporarily or permanently, from actually serving or responding to the summons for jury service.

e. With respect to the matters described above, defendant moves that in addition to the jury qualification questionnaires, he also be granted discovery of any and all other documents or papers in existence which are relevant to the determinaton of the juror's status of those persons contained in te above requested samples. This includes, but is not limited to , letters requesting excusals, orders granting excusals, and transcripts, or jury impanelment procedings at which prospective jurors, who are included within the sample were excused.

f. Defendant further moves that the Clerk of the Court be directed to permit inspection, reproduction and/or copying of all reports made to the Administrative Office of the Court by the Clerk in complicance with the reporting requirement of the Judicial Conference. The jury plan requires these reports to provide certain data which is essential to the support of the defendant's challenges to the indictment and includes the following information:

> ....general data relating to the master jury wheel, the time and manner of name selection, the source and number of names placed in the wheel and related information, an analysis of the race and sex of prospective jurors based on returns of 500 juror qualification forms drawn at random and from the master jury wheel, and an analysis by race, sex and occupation of all persons who have actually reported for jury service during the period covered by the report.

In addition, the defendant further moves that the Clerk be directed to permit the defendant inspection, reproduction and/or copying of the data constituting the underlying samples and statistical compilations upon which these reports are based.

Defendant further moves that the Clerk of the Court be directed to permit defendant inspection, reproduction and/or copying of the information that forms the basis of the determination to reply upon voter registration lists as the exclusive source of prospective jurors.

Defendant further moves that the Clerk of the Court be directed to permit defendant inspection, reproduction and/or copying of the last voter registration list for the division, which lists were actually the sources of the names placed in the present master jury wheel.

With respect to all of the above information and materials, defendant requests that the Court permit him or his counsel to mechanically reproduce or copy these materials either at the cost of the Government, or in the alternative, in such a manner as may be otherwise arranged under their direct supervision, whichever method being least costly to the defendant. This request is made because the defendant's funds for his defense against those charges are limited and the cost of commercial copying would be prohibitive.

Dated November 7, 1990

Respectfully submitted,

NARCISO S. MARILAO, JR.
Defendant
11 John St., Suite 503,
New York, NY 10038
(212) 693-1340

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT COURT OF
PENNSYLVANIA

UNITED STATES OF AMERICA :

vs.

NARCISO S. MARILAO, JR. :

CRIMINAL NO.90-0047-01

MEMORANDUM OF POINTS AND AUTHORITIES

1. It apppears that the manner and method by which the court that selected members of the Grand Jury which returned the indictment against the defendant systematically excluded segments of the eligible population in violation of the Fifth Amendment to the U.S. Constitution and Acts of Congress.

2. The use of voter registration list as the sole source of names for the master jury wheel results in substantial under-representation in the master jury wheel, in the qualified jury wheel, and in the grand jury of certain cognizable

classes, including but not limited to women, racial, ethnic and nationality minorities, people from lower socio-economic groups and young people.

3. Upon information and belief, the defendant (therefore) avers that the following cognizable classes, among others appear to have been substantially under-represented when their members within the district as shown by statistics of the U.S. Census Bureau, are compared and contrasted with the proportional appearance in the master jury wheel, the qualified jury wheel and the grand jury as finally impaneled, to wit:

a. Persons of Mexican origin

b. Persons of other Central and South American origin

c. Persons of Philippine origin

d. Persons of Pacific Islander origin

e. Brown race

f. Urban dwellers

g. Young people

h. Persons of low income, as defined by the standards of the United States government.

i. Persons who are "daily wage earners"

j. Blue collar workers

k. Poorly educated persons

l. Conscientious non-voters

m. New residence (persons who have resided in the district less than one (1) year and not more than two (2) years

n. Atheists and agnostics

4. With respect to the foregoing allegations, precise factual information is unavailable without discovery and inspection of the jury records.

5. Because the defendant has not yet been able to inspect the jury records, he is unable to make, at this time, any precise estimates of the extent of the under-representation of the cognizable classes. The defendant intends to supplement this motion by filing

affidavits and memoranda of law which will detail and constitute a specific statement as to how the defendant's rights have been violated. This motion places the matter of the composition of the grand jury in this case in issue.

6. Defendant reserves right to bring challenges if, after discovery of the materials requested in the application for inspection of the jury records, such additional challenges become appropriate.

7. Defendant is a member of the Class which had been systematically excluded, it appears.

8. Upon information and belief, defendant avers that certain favorable treatment, "deals", consideration or other leniency appear given or promised to certain witnesses called for before the Grand Jury, and it may not have been informed about them.

9. Upon information and belief, defendant alleges that there has been selective, discriminatory and vindictive enforcement of the law or prosecution, and the circumstance may not have been told to the Grand Jury.

10. Since the counts in the indictment involve complex alleged offenses and violations, the Grand Jury may not have received proper instruction on this matter.

Authorities

1. United States v. Gallo, 394 F. Supp. 310,314 (D. Conn. 1975), failure to appraise grand jury of hearsay or perjurious nature of testimony warrants dismissal of indictment.

2. United States v. DeMarco, 401 F. Supp. 505 (C.D. Cal 1975), aff'd on other grounds, 550 F.2d 1244 (9th Cir. 1977), where prosecutor fails to alert grand jury to possibility of malicious prosecution, the indictment must be dismissed.

3. Johnson v. Supreme Court, 124 Cal. Rptr. 32, 539 F.2d 792 (1975), failure to present favorable evidence before a grand jury mandates dismissal of indictment.

4. People v. Percy, 45 A.D. 2d 284; N.Y.S.2d 434 (2d Dept.1974), aff' 38 N.Y. 2d 806, 382, N.Y.S.2d 39 (1975), holds the grand jury instructions in a complex case must be recorded under C.P.L. Section 210.35(5)

5. People v. Mackey, 371 N.Y.S. 2d 559 (Suffolk Co. Ct. 1975), prosecutor's failure to properly instruct grand jury was a denial of due process.

APPENDIX "F"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA :

v. :

NARCISO SANTIAGO MARILAO JR :
Defendant
CRIMINAL NO. 90-00473-01

**MOTION OF DEFENDANT
NARCISO SANTIAGO MARILAO, JR.
FOR DISMISSAL OF INDICTMENT BASED UPON
UNCONSTITUTIONAL
COMPOSITION OF GRAND JURY**

The Defendant, Narciso Santiago Marilao, Jr., by his undersigned counsel, Jack 1. Gruenstein, Esquire, moves for the dismissal of the indictment in this matter as being illegal, void and unconstitutional on the following grounds:

1.The array of Grand Jury was not selected, drawned or summoned in accordance with law and the constitution and is not representative of the community from which it was impanelled.

2. The method of selection of the Grand

Jury which sat on the case did not produce an impartial jury drawn from a cross-section of the community and, therefore denied the Defendant the right secured to him by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

3. The composition of the Grand Jury, because it was not an impartial jury drawn from a cross-section of the community, denied the Defendant the rights secured to him by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

4. The plan for the Random Selection of Grand Jury and petit Jurors of 1968 for the Eastern District of Pennsylvania, as amended, is unconstitutional. The use of the voter registration lists as the only source list of the prospective jurors is violative of due process and equal protection of the law as guaranteed by the

Fourteenth Amendment of the U.S. Constitution, because voter registration lists, among others, over-represent men, older people, higher educated people and wealthier people, and systematically exclude and/or substantially underrepresent women, racial, national origin, ethnic or religious minorities such as Orientals (including Filipinos) and Hispanics, young people (ages 15-29), poor people with low paying jobs, and the unemployed.

5. The granting of automatic exemptions to members of the fire and police departments, U.S. Armed Forces in active service, public officers, and the excuse from jury service on request of persons over 70 years old, practicing lawyers, physicians, dentists, clergy or actively engaged members of religious orders and volunteer safety personnel violates the above stated clauses of the United States Constitution.

WHEREFORE, the Defendant prays the Court to dismiss the indictment in this case.

Respectfully submitted,

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Dated: March 21, 1991

APPENDIX "G"

28 USCS Sec. 1867

Sec. 1867. Challenging compliance with selection procedures

a) In criminal cases, before the voir dire examinations begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefore, whichever is earlier , the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

b) In criminal cases, before the voir dire examinations begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefore, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefore, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.

d) Upon motion filed under subsection (a), (b). or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commision or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commisioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss

the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

f) The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed,

except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(b)(4) of this title, and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, or copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year or both.

(June 25, 1948, ch 645 Sec. 1, 62 Stat. 953; Sept. 2, 1957, P.L. 85259, 71 Stat. 583; Mar. 27, 1968, P.L. 90-274, Sec.101, 82 Stat. 59.)

Rule 32 Federal Rules Of Criminal Procedure

c) Presentence Investigation.

1) When Made. A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 USC 3553, and the court explains this finding on the record. Except with the written consent of the defendant, the report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolocontendere or has been found guilty.

2) Report. The report of the presentence investigation shall contain —

A) information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in

imposing sentence or in the correctional treatment of the defendant.

B) the classification of the offense and of the defendant under the categories established by the Sentencing Commision pursuant to section 994(a) of title 28, that the probaton officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commision pursuant to 28 USC 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind, or of a different length from one within the applicable guideline would be more appropriate under all the circumstances;

C) any pertinent policy statement issued by the Sentencing Commision pursuant to 28 USC 994(a)(2);

D) verified information stated in a nonargumentative style containing an

assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

F) such other information as may be required by the court.

3) Disclosure.

A) At least 10 days before imposing sentence, unless this minimum period is waived by the defendant, the court shall provide the defendant and the defendant's counsel with a copy of the report of the presentence investigation, including the information required by subdivision (c)(2) but not including any final recommendation as to sentence, and not to the extent that in the opinion of the court the report contains diagnostic opinions, which if disclosed, might seriously disrupt a program of rehabilitation; or sources of information

obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuaracy contained in it.

B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

C) Any material which may be disclosed to the defendant and the defendant's counsel shall be disclosed to the attorney for the government.

D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available ot the Bureau of Prisons.

E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons pursuant to 18 USC Sec.3552(b) shall be considered a presentence investigation within the meaning of subdivision (c) (3) of this rule.

F) (Redesignated)

No. 92-1715

FILED
JUN 28 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

NARCISO S. MARILAO, JR., PETITONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioner's motion to inspect the district court clerk's jury selection lists.

2. Whether the district court denied petitioner the opportunity to comment on his amended presentence report.

3. Whether the government engaged in misconduct that warranted dismissal of the indictment or a new trial.

4. Whether the district court abused its discretion in admitting evidence under Federal Rule of Evidence 404(b).

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-3A) is unpublished, but the decision is noted at 986 F.2d 1410 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1993. A petition for rehearing was denied on February 23, 1993. Pet. App. 4A-5A. The petition for a writ of certiorari was filed on April 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of conspiracy to defraud the Immigration and Naturalization Service (INS), in violation of 18 U.S.C. 371, and on three counts of using fraudulent immigration documents, in violation of 18 U.S.C. 1546(a). He was sentenced to 16 months' imprisonment, to be followed by three years' supervised release, and was ordered to pay a $10,000 fine. The court of appeals affirmed. Pet. App. 1A-3A.

1. In April 1990, Rodolfo Pamposa, a Philippine national illegally present in the United States, consulted petitioner, a New Jersey attorney who practiced immigration law, to determine whether Pamposa was eligible for amnesty. Pamposa told petitioner that he had first arrived in this country in 1984 and that his last entry occurred in 1988. Petitioner advised Pamposa that he would have to change his date of entry to qualify for amnesty. Subsequently, at petitioner's instruction, Pamposa obtained false certifications showing that he had resided and been employed in the United States from 1976 to 1980. Petitioner later prepared an application for amnesty that falsely stated Pamposa's residence and date of entry. Gov't C.A. Br. 8-9.

In early May 1990, petitioner took Pamposa and Salvadore Panahon, another illegal Philippine alien, to the New York INS office to apply for amnesty. Both Pamposa and Panahon were New Jersey residents, but petitioner changed the addresses on their amnesty applications to state that they resided in

New York. INS denied both Pamposa's and Panahon's applications for amnesty. Gov't C.A. Br. 9-10.

On May 21, 1990, petitioner altered Pamposa's and Panahon's amnesty applications to state that they lived in Philadelphia. He then took Pamposa, Panahon, and Elderina Corado, a third illegal Philippine alien, to the Philadelphia INS office to apply for amnesty. On petitioner's advice, Pamposa and Corado falsely told INS officials that they lived in Philadelphia. Gov't C.A. Br. 10-11.

2. In July 1990, INS officials visited Corado and Pamposa. The INS agents told Corado and Pamposa that their amnesty applications had been found to be fraudulent and that if they were willing to make complete and truthful statements, they would be prosecuted for misdemeanors instead of felonies. After being informed of their *Miranda* rights, both Corado and Pamposa executed written waivers of those rights and then gave statements recounting that petitioner counseled and aided them in including false information in their amnesty applications. At the request of INS officials, Pamposa and Corado also recorded telephone conversations with petitioner. Gov't C.A. Br. 11-12, 20-23.

3. Petitioner was subsequently indicted and convicted for defrauding the INS and for using fraudulent immigration documents. On appeal, petitioner challenged the district court's denial of his pretrial motion to inspect the district court clerk's records regarding the selection of the grand and petit juries in his case, Pet. App. 6A-7A, 16A-22A, 23A-24A; Gov't C.A. Br. 13-16; the district court's admission of testimony of two other illegal Philippine aliens that petitioner had assisted in making fraudulent amnesty

applications, Gov't C.A. Br. 38-39; and the district court's denial of petitioner's request for dismissal or a new trial based on the government's misconduct, Gov't C.A. Br. 19-31. The court of appeals summarily affirmed. Pet. App. 1A-3A.

ARGUMENT

1. Petitioner contends (Pet. 9-13) that the district court erred in denying his motion to inspect jury selection records for the Eastern District of Pennsylvania. That contention is without merit.

The Jury Selection and Service Act of 1968, 28 U.S.C. 1861-1878, requires the random selection of potential jurors from voter registration lists or lists of actual voters, as supplemented by other sources if necessary to foster the Act's policy of ensuring selection of juries from a fair cross-section of the community. See 28 U.S.C. 1861, 1863. The Act sets forth detailed procedures that each judicial district must follow to guarantee that grand and petit juries are chosen in a nondiscriminatory fashion. See 28 U.S.C. 1862-1864, 1866.

Under the Act, a criminal defendant may move to dismiss an indictment or stay the proceedings against him "on the ground of substantial failure to comply with the provisions [of the Act] in selecting the grand or petit jury." 28 U.S.C. 1867(a). The Act gives a criminal defendant who makes or intends to make such a motion the right to obtain inspection of the records compiled by the clerk of the court in the jury selection process. 28 U.S.C. 1867(a) and (f). In *Test* v. *United States*, 420 U.S. 28 (1975) (per curiam), this Court held that litigants have "essentially an unqualified right to inspect jury lists" in order to

support a motion "challenging jury-selection procedures." *Id.* at 30 (emphasis omitted).

Petitioner moved to inspect the jury selection records for the Eastern District of Pennsylvania. He made that motion in support of his challenge to the district court clerk's use of voter registration lists to select potential jurors. That system of selection, he argued, resulted in the underrepresentation of certain minorities, in violation of the Constitution. He did not allege, however, that the clerk had failed to comply with the requirements of the Act. Accordingly, his motion represented a facial challenge to the Act's preference for using voter registration rolls as a pool for jury venires, and not an attack on the particular jury selection procedures used to select the grand jury that indicted him. Thus, his motion did not fall within the provision of the Act allowing access to jury selection records, he was not entitled to obtain inspection of the records he sought, and this Court's decision in *Test* is inapposite.

Petitioner's underlying challenge to the use of voter registration records as the source of jury venires is without merit. The Third Circuit has long held that such use of voter registration lists is constitutionally permissible. See *United States* v. *Lewis*, 472 F.2d 252, 256 (3d Cir. 1973); see also *United States* v. *Frumento*, 409 F. Supp. 136, 141 (E.D. Pa. 1976), aff'd, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 439 U.S. 1072 (1978) (challenge under Act and Fifth Amendment); *United States* v. *Long*, 88 F.R.D. 701, 705 (W.D. Pa. 1981), aff'd, 676 F.2d 688 (3d Cir.), cert. denied, 459 U.S. 829 (1982); *Savage* v. *United States*, 547 F.2d 212, 214-215 (3d Cir. 1976) (petit jury). Every court of appeals to have addressed the issue has

upheld the Act's preference for the use of voter registration lists against a Sixth Amendment challenge. See *United States* v. *Cecil*, 836 F.2d 1431, 1451 (4th Cir.) (en banc), cert. denied, 487 U.S. 1205 (1988); *United States* v. *Afflerbach*, 754 F.2d 866, 869-870 (10th Cir.), cert. denied, 472 U.S. 1029 (1985); *United States* v. *Pepe*, 747 F.2d 632, 648-649 (11th Cir. 1984); *United States* v. *Hafen*, 726 F.2d 21, 22-24 (1st Cir.), cert. denied, 466 U.S. 962 (1984); *United States* v. *Hawkins*, 661 F.2d 436, 442 (5th Cir. 1981), cert. denied, 456 U.S. 991 (1982); *United States* v. *Warinner*, 607 F.2d 210, 214 (8th Cir. 1979), cert. denied, 445 U.S. 927 (1980); *United States* v. *Brady*, 579 F.2d 1121, 1134 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979). The grand jury records that petitioner sought could not have buttressed that legal challenge; the court of appeals was therefore correct in denying petitioner relief.

2. Petitioner next contends (Pet. 14-17) that the district court denied him an opportunity to comment on the revised presentence report at his sentencing hearing. Petitioner raised that claim for the first time in his petition for rehearing; this Court should accordingly decline to review it. See *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992); cf. *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1531 (1992). In any event, petitioner's contention is meritless.

Petitioner and his attorney each filed objections to the presentence report. In response to those objections, the probation office produced an amended report. At sentencing the district court specifically noted that petitioner was dissatisfied with the amended report. Accordingly, the district court allowed petitioner's counsel to argue at length re-

garding petitioner's objections to the revised report. The district court also did not prevent petitioner himself from commenting on the report. Instead, the court told petitioner that his attorney had adequately addressed the legal issues surrounding his sentencing and that petitioner would be better off making a personal statement. When petitioner disregarded that advice, the district court did not make any effort to preclude petitioner from addressing the presentence report, nor did it limit petitioner's comments to the court. 4/24/92 videotape 9:12-9:13, 11:06-11:10.* Petitioner's sentencing fully complied with the requirements of Federal Rule of Criminal Procedure 32.

3. Petitioner also errs in arguing (Pet. 18-28) that the government engaged in outrageous conduct that should have led the district court to dismiss the indictment or grant a new trial.

a. Petitioner claims (Pet. 18-21) that the INS agents' contact with Corado and Pamposa after their visit to the Philadelphia INS office violated Rule 4.2 of the Model Rules of Professional Conduct (1984), which provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

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* Pursuant to 28 U.S.C. 753, the Judicial Conference of the United States has authorized the Eastern District of Pennsylvania, on an experimental basis, to use videotape recording for making the official record of court proceedings. See Standing Order for Videotape Recording of Court Proceedings, E.D. Pa. R. 15 foll.

That rule has no application to this case. First, the rule does not prohibit preindictment, investigative contacts by law enforcement officers with persons represented by counsel. See *United States* v. *Ryans*, 903 F.2d 731, 735-739 (10th Cir.), cert. denied, 498 U.S. 855 (1990); *United States* v. *Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986); *United States* v. *Dobbs*, 711 F.2d 84, 86 (8th Cir. 1983); *United States* v. *Kenny*, 645 F.2d 1323, 1339 (9th Cir.), cert. denied, 452 U.S. 920 (1981). Second, this is not a case in which the agents of the government contacted a suspect in the absence of his counsel; in this case, the lawyer was the suspect. The agents' contacts with the clients did not in any way affect petitioner's right to counsel as would be his claim if petitioner had been the client-suspect who was contacted in the absence of his lawyer. Third, even if petitioner could establish that the INS agents' contact with Corado and Pamposa violated Rule 4.2, he would not be entitled to the relief he seeks. Absent a violation of a statute, rule, or constitutional provision designed to control the conduct of government agents, a court may not exercise its supervisory powers to dismiss an indictment or grant a new trial simply because the court concluded that an investigative agent's conduct was improper or unethical. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-256 (1988); *United States* v. *Hasting*, 461 U.S. 499, 505 (1983); *United States* v. *Payner*, 447 U.S. 727, 736 n.8 (1980); cf. *United States* v. *Williams*, 112 S. Ct. 1735, 1741-1742 (1992).

b. Petitioner further asserts (Pet. 22) that the government should have informed the grand jury of the "lenient charges and sentences and Employment Authorization Cards given to government star

witnesses Corado and Pamposa." In fact, the government informed the grand jury that Corado and Pamposa were going to plead guilty to misdemeanors. The other aspects of their plea agreements had not been resolved when they testified before the grand jury. Gov't C.A. Br. 29. Furthermore, this Court recently has made clear that the government has no duty to present to the grand jury all evidence bearing on the credibility of a witness. See *Williams*, 112 S. Ct. at 1742.

c. There is likewise no merit to petitioner's claim (Pet. 22) that the presence of a second prosecutor in the grand jury room violated Federal Rule of Criminal Procedure 6(d). Rule 6(d) provides that "[a]ttorneys for the government * * * may be present while the grand jury is in session," and Federal Rule of Criminal Procedure 54 defines "[a]ttorneys for the government" to include "an authorized assistant of a United States Attorney." There is no prohibition against several prosecutors being present at one time. In any event, petitioner has now been convicted by a jury. Therefore, even if there had been a violation of Rule 6(d), the subsequent jury verdict would render that error harmless. See *United States* v. *Mechanik*, 475 U.S. 66, 72-73 (1986).

d. Finally, petitioner alleges (Pet. 25-28) that the prosecutor engaged in several acts of trial misconduct that were sufficiently outrageous to warrant relief. As to the claim that the prosecutor spoke with a witness at a recess during her cross-examination, the government pointed out in its brief on appeal that the only recess during her testimony occurred during direct examination, not cross-examination. Gov't C.A. Br. 31. Petitioner's objection to the reference to

the high fees he charged Pamposa and Corado is not well taken. The size of the fees that petitioner charged provided some indication that petitioner knew the course he was pursuing on behalf of his clients was unlawful. With respect to petitioner's complaint about the prosecutor's alleged "vouching" for his witnesses, it was entirely appropriate for the prosecutor to elicit the terms of the witnesses' cooperation agreements in anticipation of cross-examination. See *United States* v. *Oxman*, 740 F.2d 1298, 1302-1303 (3d Cir. 1984); *United States* v. *McNeill*, 728 F.2d 5, 14 (1st Cir. 1984); *United States* v. *Rohrer*, 708 F.2d 429, 433 (9th Cir. 1983). And the prosecutor's closing argument, in which he contended that the prosecution's witnesses were credible and petitioner's were not, was entirely proper. Petitioner's claims of trial error are thus without merit and in any event fall far short of the sort of outrageous conduct that could be deemed to violate the Due Process Clause. See *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973).

4. Petitioner's final claim (Pet. 29-31) is that the district court abused its discretion by admitting under Federal Rule of Evidence 404(b) testimony from two other illegal aliens that petitioner had instructed them to prepare fraudulent immigration documentation. That fact-bound claim is wholly without merit.

Rule 404(b) allows the admission of evidence of "other crimes, wrongs, or acts" to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See *Huddleston* v. *United States*, 485 U.S. 681 (1988). In this case, the government introduced evidence that petitioner engaged in acts with other illegal aliens

that were strikingly similar to and occurred almost simultaneously with the offenses charged in the indictment. That evidence tended to show that petitioner acted with criminal intent and that the witnesses did not simply misconstrue his legal advice to them. Moreover, the district court lessened the risk of any unfair prejudice to petitioner by giving the jury a limiting instruction regarding that evidence. Accordingly, petitioner's claim does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

JUNE 1993